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No. 95-1329

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CONRAD MOCK and BARBARA MOCK,

Petitioners,

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondents.

Petition for a Writ of Certiorari to the Pennsylvania Supreme Court

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the denial of the Mocks' application for a permit to place fill in wetlands deny the Mocks all economically beneficial use of their property?

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Respondent Commonwealth of Pennsylvania, Department of Environmental Protection ("the Department")[1], hereby opposes the Petition for Writ of Certiorari filed by Conrad and Barbara Mock ("the Mocks").

RESPONDENT'S STATEMENT OF THE CASE

The Mocks are part owners of a property purchased in February, 1963 by Conrad Mock and his brother, Edgar Mock, for a total purchase price of $9,000. Two 25% shares in the property were subsequently sold to individuals named John Alliger and Tom Rowan for $4,000 per share. A further division of the property interests occurred when Tom Rowan died and his interest was divided between Conrad Mock and John Alliger. The dates of these property transfers are unknown from the record below; all that is known is that the last transfer took place some time after 1985. The precise nature of Barbara Mock's interest in the property is not clear on the record below; all that was established is that she is a part owner.

The 5.2 acre site has approximately 3.94 acres of delineated wetlands and approximately 1 1/4 acres of "uplands" or non-wetlands acreage. All but the upland areas are within the 100-year floodplain of Pine Run Creek, which runs along the northern boundary of the site.

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[1] At the time of the administrative action at issue, the Department was known as the Department of Environmental Resources ("DER"). In 1995, under the *Pennsylvania Conservation and Natural Resources Act*, Act of June 28, 1995, P.L. 89, No. 18, 71 P.S. §§ 1340.101 *et seq.*, the Pennsylvania General Assembly split DER into two agencies: the Department of Environmental Protection and the Department of Conservation and Natural Resources. For purposes of the permitting action at issue, the Department of Environmental Protection is the successor agency.

The property has not been subdivided or developed since its purchase. The property owners pursued one offer to purchase the land in the mid-eighties when Conrad Mock entered into negotiations with Midas Realty Corporation. Midas intended to build an automotive repair facility on the site. Conrad Mock, Edgar Mock, John Alliger and Tom Rowan entered into an agreement of sale with Midas which provided for a purchase price of $175,000 and a deposit to be made of $17,500. The agreement provided that the deposit would be non-refundable after January 31, 1986, but the deposit was apparently never made.

PERMIT APPLICATION PROCESS

Midas applied to the Department in February, 1986 for a permit to allow the fill necessary to develop the wetlands but, because of the time delays they believed would be involved in pursuing the permit, they lost interest in the property. The property owners agreed to release Midas from the agreement of sale because they believed that developing the property themselves presented a much more valuable option than selling it to Midas. No subsequent attempts have been made to sell the property.

Consistent with the decision to develop the property, the Mocks submitted an application to the Department.[2] The Mocks sought approval for the placement of fill in approximately 0.87 acres of the wetlands on site, to allow the construction of an automotive repair facility. The Mocks offered to offset the loss of

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[2] The Department regulates activities in wetlands under the provisions of the *Dam Safety and Encroachments Act*, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. § 693.1 *et seq.* and the rules and regulations adopted pursuant to the Act, specifically 25 Pa. Code Chapter 105. The Chapter 105 regulations were substantially amended in 1991, but the Mocks' permit application was submitted and reviewed under the regulations in effect prior to the 1991 amendment.

0.87 acres of wetlands with the construction of a new wetland area on the property of 0.38 acres in size.

The Department conducted a preliminary review of the application and concluded that the project, as proposed, presented the potential for significant adverse environmental impact. By letter dated September 23, 1988, the Department informed the Mocks of the results of the preliminary review, and requested that the Mocks submit information addressing the Department's concerns, specifically: (1) the proposed project's potential for adverse environmental impact; (2) the fact that the proposed facility did not need to be located on or near the wetlands, that is, that the proposed project was not water-dependent; (3) the fact that the application did not address alternatives for the project which could significantly reduce the projected adverse environmental impacts. The Department also requested that additional justification be provided to justify and document the need for the proposed project.

In October, 1988, the Department contacted the Mocks' engineering consultant, Russell Benner, and recommended that the Mocks revise their proposal to limit proposed construction to the uplands portion of the property. Benner indicated that he would prepare the revised plans for construction in the uplands, and pursue the variances necessary from Plumstead Township to allow construction in this area. However, no proposal for construction in the uplands was ever submitted to the Department, and no variances were ever sought from Plumstead Township.[3]

The Mocks responded to the Department's preliminary review letter by letter dated September 30, 1988. The letter asked that the Department proceed to either approve or deny the

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[3] There was, in fact, no evidence that the Mocks, in preparing the proposal for construction in the wetlands, sought variances from any of the Township building requirements, such as setback distances or the number of parking spaces.

application on the basis of the information provided in the letter, as the Mocks would not provide any further response to the Department's concerns. The letter did not offer the analysis of less environmentally damaging alternatives requested by the Department.

The Department completed review of the application on the basis of the information submitted. The Department concluded that the Mocks' application did not demonstrate that the project, as proposed in the application, minimized or avoided the threatened environmental harm to the maximum extent possible, and that the Mocks had not exhausted the possibilities for redesign and relocation on the site. By letter dated April 12, 1990, the Department denied the permit application.

PROCEDURAL HISTORY

The Mocks appealed this decision to the Environmental Hearing Board, contending that the Department had improperly denied the permit application and that the denial had resulted in a taking of their property. The Board's adjudication, issued on May 1, 1992, held that the Department had correctly denied the permit application, and that the denial did not constitute a taking under either state or federal law. *Mock v. Commonwealth, DER*, 1992 EHB 537.

The Board found that the Department had correctly determined that the project, if approved, would cause significant environmental harm.

> Appellants' proposed project would completely destroy 0.87 acres of these wetlands, eliminating their ability to function as a habitat for fish and wildlife species and to provide water quality improvement and flood storage.

1992 EHB at 548-549. The Board then considered whether the Mocks had taken adequate steps to mitigate the threatened environmental harm. Mitigation is defined at 25 Pa. Code § 105.1 as follows:

> (i) Minimize impacts by limiting the degree or magnitude of the action and its implementation.
>
> (ii) Rectify the impact by repairing, rehabilitating or restoring the impacted environment.
>
> (iii) Reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action.
>
> (iv) If the results listed in subparagraphs (i)-(iii) of this definition cannot be achieved, compensate for the impact by replacing or providing substitute resources or environments.

25 Pa. Code § 105.1. The Board determined that the Mocks failed to satisfy factor (i) of the mitigation requirements in that they failed to consider options to minimize or eliminate the impact on the wetlands, 1992 EHB at 558, and that they also failed to satisfy factor (iv) because their proposal for replacement wetlands was inadequate in both size and quality to compensate for the wetlands that would be lost. 1992 EHB at 559.

The Board concluded that the Mocks had not met their burden of proof and that, given the failure to mitigate the serious environmental harm posed by the project, the Department was correct in denying the permit.

The Mocks appealed to the Commonwealth Court. On appeal, the Mocks conceded the correctness of the regulatory permitting decision and contested only that portion of the Board's adjudication which held that the denial did not constitute a taking. In appealing to the Commonwealth Court, the Mocks relied solely

on this Court's decision in *Lucas v. South Carolina Coastal Council*, 508 U.S. 1003, 112 S.Ct. 2886 (1992), a decision which was published after the issuance of the Board's adjudication, but prior to the filing of appeal in the Commonwealth Court.

Commonwealth Court found that the facts in this case did not justify the Mocks' reliance on *Lucas*, and that the Board correctly found that the Department's denial of the permit application, when considered under the principles of traditional takings analysis, did not result in a taking. *Mock v. Commonwealth, DER*, 154 Pa. Commw. 380, 623 A.2d 940 (1993). The Pennsylvania Supreme Court granted review of Commonwealth Court's decision and, on November 22, 1995, issued a *per curiam* order affirming the lower court's order.

SUMMARY OF ARGUMENT

In the Petition for a Writ of Certiorari, the Mocks assert that the decision of the Pennsylvania Supreme Court presents four questions which should be reviewed by this Court. Two of the questions were never presented to the Pennsylvania courts; this Court therefore lacks jurisdiction to review these questions. The remaining two questions rest on an assumption that is not supported by the record below. Petitioners assume that they have successfully proven that the denial of the permit at issue rendered their property valueless but the facts established below contradict this assumption. Therefore, the Pennsylvania courts correctly concluded that the facts in this case did not justify the application of the categorical rule of *Lucas v. South Carolina Coastal Council*, 508 U.S. 1003, 112 S.Ct. 2886 (1992).

No compelling reasons exist to grant the Writ of Certiorari. The Pennsylvania courts did not decide the case in a way that conflicts with the decisions of this Court, or of another state court of last resort, or of a United States Court of Appeals. The Pennsylvania courts correctly stated this Court's analysis in *Lucas*, and correctly applied the analysis to the factual findings of record to find no taking under *Lucas*. The courts then followed

settled principles of traditional takings analysis, as articulated by this Court, to conclude that no taking occurred.

ARGUMENT

I. PETITIONERS ATTEMPT TO SEEK REVIEW FROM THIS COURT OF QUESTIONS WHICH WERE NEVER PRESENTED TO THE PENNSYLVANIA COURTS

Petitioners ask this Court to consider questions that were never presented to the Pennsylvania courts, specifically, of the questions presented by appellants, questions 1 and 4:

> 1. Is categorical treatment of regulatory action which denies all economically beneficial or productive use of land appropriate for "as applied" as well as facial takings challenges under the Fifth Amendment?
>
> 4. Are the landowners' investment-backed expectations to be considered in cases of categorical regulatory takings, and if so, were those expectations of petitioners frustrated by their inability to develop commercially zoned property because of wetlands restrictions enacted long after the property was purchased?

Petitioners' Petition for a Writ of Certiorari at i. Review of the questions presented to the Pennsylvania appellate courts, and the briefs filed in support of appellants' position, shows no evidence that these questions were raised or argued to the state courts at any level.[4] The questions have emerged in the Petition for Certiorari

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[4] The issue of reasonable investment-backed expectations and its relationship to the *Lucas* analysis was discussed briefly by petitioners in their brief to the Commonwealth Court, but there they argued that *Lucas* does not permit the analysis of investment-

for the first time, thus asking this Court to "review" questions which the Pennsylvania courts never had the opportunity to consider.

Petitioners ignore the requirements of the Court expressed in Supreme Court Rule 14. That rule specifies the contents for a Petition for a Writ of Certiorari and provides that, when review of a state-court judgment is sought, a petitioner must show that the federal question was timely and properly raised thereby establishing the Court's jurisdiction to review the judgment on granting of the writ. Petitioners must specify in the statement of the case, with specific references to the record, when and how in the state proceedings the federal questions sought to be reviewed were raised and the way in which they were passed on by the state courts. Sup. Ct. R. 14.1.(g)(i).

The Mocks' petition shows no evidence of compliance with Rule 14 with respect to any of the issues raised. With respect to issues 1 and 4, quoted above, such compliance would be impossible given that the Mocks never previously articulated these issues. The attempt to raise such issues at this level violates fundamental principles of appellate review and deprives the Court of jurisdiction to hear the issues.

II. THE FACTS ESTABLISHED IN THIS CASE DO NOT PRESENT THE ISSUES RAISED BY PETITIONERS

Petitioners base their statement of the questions presented, their statement of the facts, and their arguments on two assumptions: (1) that they successfully established that the permit

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backed expectations undertaken by the Environmental Hearing Board in its adjudication. Commonwealth Court Brief for Appellants at 14. The Commonwealth Court did not address this argument and the Mocks did not raise it to the Pennsylvania Supreme Court.

denial rendered their property valueless, and (2) that the record below establishes that no permit could issue for the site under any circumstance. The facts established below contradict both assumptions.

A. THE PERMIT DENIAL DID NOT RENDER THE PROPERTY VALUELESS

In arguing that the permit denial rendered their property valueless, petitioners rely heavily on the Environmental Hearing Board's finding that "The site in its present condition and without a permit to fill in a portion of the wetlands is essentially valueless". *Mock v. Commonwealth, DER*, 1992 EHB 537, 548. Petitioners' assumption and the Board's conclusion are not, however, one and the same, as petitioners attempt to lend meaning and weight to the Board's limited statement that it cannot support.

The Board was simply stating its factual conclusion that the property, if not permitted, and if not developed, held essentially no value. Petitioners, in their arguments, conclude that this statement is equivalent to a finding that this specific permit denial rendered the property valueless. The leap of logic that underlies this broadening of the Board's conclusion is that this permit denial amounted to a complete bar to permitting and development of the property. This logic must fail, because the record clearly establishes that the Mocks had not exhausted the possibilities for permittable development of the site.

In considering the record on this point, the import of the Mocks' concession that the permitting denial was appropriate should be considered. The Department's denial of the permit was based, in part, on the conclusion that the Mocks had not adequately avoided or minimized the environmental harm threatened by the project. The Board found the Department's conclusion to be justified because the Mocks had not considered reducing the size of the project or changing its proposed use. In addition, the Board found that the Mocks' mitigation offer, of only 0.38 acres to replace the 0.87 acres that would be totally destroyed

by the project, was inadequate. The Board found that the Mocks had totally overlooked the possibility that the proposed facility could be reduced in size, thus lessening the environmental impact, and that the Mocks had overlooked as well the possibility that additional mitigation could be provided through construction of off-site replacement wetlands.

The Board reached all of these conclusions in upholding the permit denial. The Mocks conceded on appeal that the permitting denial was appropriate and did not contest the Board's holdings on the permit denial. It is clear from the Board's analysis of the permit denial that possibilities remained for permittable development in the wetlands portion of the property, that the Mocks had not exhausted those possibilities as a means of minimizing the net loss of wetlands area, and that the permit denial on this ground was justified. The petitioners are now bound by these conclusions and cannot collaterally challenge them. They cannot, on the one hand, agree to the correctness of the permitting denial and the reasons for it, and then, on the other hand, argue the invalidity of those same conclusions to support their takings analysis.

Although the Environmental Hearing Board did not have the benefit of the Court's *Lucas* analysis, the Board did consider economic impact and concluded that the Mocks had not demonstrated that their investment-backed expectations had been destroyed. 1992 EHB at 557. Petitioners ignore this important finding by the Board and fail to deal with the implications of it. This finding makes clear that the Board did not conclude that the permit denial rendered the property valueless.

B. PETITIONERS ARE NOT PRECLUDED FROM DEVELOPING THE PROPERTY

Petitioners are also incorrect in asserting that the record establishes that a permit could not issue for the site under any circumstances. To the contrary, the record establishes that

the Department would have been likely to agree to the permitting necessary to allow development in the uplands. Commonwealth Court summarized the state of the record on this point:

> The Mocks ... argue that the department never guaranteed that it would approve a permit to fill wetlands for an access road to reach the garage if it was moved to the uplands corner, or for any other purpose, but the record does not support this contention. Because the Mocks never submitted alternative proposals to the department, the department could only respond to questions about hypothetical situations. However, when questioned about the possibility of granting a permit to fill wetlands for an access road to reach the southeast uplands corner, Richard Shannon, a water pollution biologist for the department, testified, "I feel that a driveway construction on this property would be feasible because the impact would be minimal.

623 A.2d at 947. In arguing that any new permit application would have been futile, petitioners totally ignore both this testimony and the Commonwealth Court's analysis of it.

Given the various possibilities that remained for permittable development of the site, it can scarcely be said that no permitting or development could occur, and therefore that the site must remain valueless. In this case, it is not the permit denial that has rendered the property valueless, but rather, as found by the Department, the Environmental Hearing Board, and the Pennsylvania appellate courts, the Mocks' failure to explore other options for the site.

In summary, petitioners' statement that the permit denial has rendered the property valueless is based on a misstatement of the Environmental Hearing Board's factual conclusions and is not supported by the facts in the record. Many of the arguments

raised in support of the petition rely on this flawed assumption and the facts then do not support these arguments. More fundamentally, the facts do not give rise to questions 2 and 3 of the questions presented, as those questions rely on the assumption that the Mocks successfully established that the permit denial rendered the property valueless. These questions, therefore, have not been properly raised to this Court.

III. THE PENNSYLVANIA SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISION IN *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*

The Pennsylvania courts, in reaching the conclusion that the Department's denial of the Mocks' application for a permit did not result in a taking, acted consistently with this Court's decision in *Lucas v. South Carolina Coastal Council*, 508 U.S. 1003, 112 S.Ct. 2886 (1992). The analysis of *Lucas* is contained in the opinion of the Commonwealth Court, an opinion which was upheld by the Pennsylvania Supreme Court's *per curiam* affirmance.

Petitioners seriously mischaracterize the Commonwealth Court's opinion in arguing to this Court that

> the Court considered *Lucas* and declined to apply its constitutional standard for determining whether the permit denial was a regulatory taking, despite finding substantial evidence to support the EHB's conclusion that the property was valueless in its present condition.

Petition for a Writ of Certiorari at 8. Consideration of the Commonwealth Court's opinion shows that the Court properly stated the principles of *Lucas* and then appropriately applied those principles to the facts of record.

A. COMMONWEALTH COURT CAREFULLY FOLLOWED THIS COURT'S ANALYSIS IN *LUCAS*

Commonwealth Court's analysis of *Lucas* begins with an explanation of the factual setting for the case, then explains the Court's standard for categorical treatment of takings claims, noting that two categories of regulatory actions are compensable without the typical case-by-case, fact-specific analysis which attends a typical takings case. In addition to physical invasion, *Lucas* made clear that categorical treatment was appropriate "where regulation denies all economically beneficial or productive use of land." 623 A.2d at 945, citing *Lucas* at ____, 112 S.Ct. at 2893. Commonwealth Court then recognized that, where a categorical taking has been found, the government must compensate the landowner unless state law would have imposed such a restriction at the time of acquisition of the property. 623 A.2d at 946.

Petitioners do not really argue that the Pennsylvania courts failed to properly state the principles of *Lucas*, but rather that the courts failed to properly apply *Lucas*' categorical takings standard.[5] Petitioners offer several arguments in support of their contention that the courts below did not properly apply the *Lucas* standard.

B. PETITIONERS MISINTERPRET THE ENVIRONMENTAL HEARING BOARD'S FINDING

First, petitioners argue that the courts failed to give proper weight to the Environmental Hearing Board's finding regarding the land's value as undeveloped, unpermitted property. As discussed above, this contention improperly interprets the Board's limited

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[5] This Court's rules provide that a petition for a writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law. S.Ct. Rule 10.

factual conclusion. Commonwealth Court placed this finding in the proper perspective:

> The import of the Board's finding, that the land in its current state is valueless, is simply to state that the Mocks' undeveloped property at present is without economic value. That finding does not mean that the Mocks' property must remain undeveloped and devoid of value in the future because of the department's environmental regulations.

623 A.2d at 946.

Commonwealth Court agreed with the Environmental Hearing Board's statement that the Department's action was only "to deny permission for Appellants [the Mocks] to proceed with a specific project design. It does not go beyond that point." *Id.* at 947. The court agreed that possibilities for permittable development of the site remained, and that the property was not devoid of all value. The court therefore found that the categorical rule of *Lucas* was not applicable to the facts of record in this case. This conclusion is wholly consistent with this Court's analysis in *Lucas*. It is only by twisting the meaning of the Environmental Hearing Board's finding that petitioners can attempt to argue otherwise.

C. THE BURDEN OF PROOF WAS PROPERLY ASSIGNED AND THE MOCKS FAILED TO MEET THAT BURDEN

Petitioners also argue that the Pennsylvania courts attempted to avoid a proper application of *Lucas'* categorical rule by imposing an improper burden of proof on the Mocks: "an uncertain and potentially interminable burden of excluding all economically viable use in the permit application process." Petition for a Writ of Certiorari at 12. Petitioners assert that the Pennsylvania courts would require them to submit endless

alternative proposals even though they established that further submissions would be futile. The record belies these assertions.

Petitioners' assertion that the Department "acknowledged that no alternate plan would be acceptable," Petition for a Writ of Certiorari at 12, is flatly contradicted by the record. Although the Mocks never submitted any alternative plans for development in the uplands, the Department testified at hearing that such development would very likely have been permitted had the application been submitted. While petitioners completely ignore this testimony, Commonwealth Court properly noted its significance. 623 A.2d at 947.

The Mocks also never addressed the Department's concerns for development in the wetlands by either scaling down or changing the project, or increasing their offer for replacement wetlands. The Mocks never answered the Department's requests for less environmentally damaging proposals, nor did they produce credible evidence, either in the permit application process, or at hearing, that there were no alternatives less damaging to the wetlands. The only testimony on this point was from the Mocks' consultant, Russell Benner, and the Board rejected this testimony as incredible, given the size and scope of the project. 1992 EHB at 550.

The Mocks concede that the permit was correctly denied for failure to explore less environmentally damaging alternatives, yet then decry the courts' finding that because unexplored possibilities for permittable development of the site still exist, it cannot be said that the regulatory scheme has stripped the property of all value. Far from insisting on endless numbers of submissions, the Pennsylvania courts simply said that the failure of this one submission could not establish a taking, given the facts established on the record below.

Petitioners also argue that the Court should extend the reasoning on burden of proof issues expressed in *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct 2309 (1994), to this case. The

facts in this case are far removed from those in *Dolan*, and provide no basis for a similar analysis on burden of proof.

In *Dolan*, the municipality conditioned the grant of a permit on a requirement that the landowner dedicate a portion of her property for a public greenway and for a pedestrian/bicycle pathway. Under these facts, the Court found it proper to impose the burden of proof on the municipality to demonstrate that the regulatory restriction was related in nature and extent to the impact of the proposed development. The Court distinguished this case from other land use regulation cases on two bases: first there was a single adjudicative decision rather than a general legislative determination, and, second, "the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city." ___ U.S. at ___, 114 S.Ct. at 2316. Neither basis of distinction applies to the instant case.

The Court specifically noted the general rule that the burden properly rests on the party asserting the taking ___ U.S. at ____, n.8, 114 S.Ct. at 2320, n.8. The facts in this case are not analogous to those in *Dolan*, and petitioners' argument seeks a reallocation of the burden of proof that is, in fact, inconsistent with *Dolan* and with the Court's prior decisions discussing this issue.

Petitioners' arguments regarding the burden of proof and production rest on the conclusion that they established that further applications would be futile.[6] The conclusion is erroneous and

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[6] Petitioners also argue that the Environmental Hearing Board imposed a standard of proof that is inconsistent with the decision of the U.S. Court of Claims in *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990), *aff'd* 28 F.3d 1171 (Fed. Cir. 1994). The Court of Claims' view on burden of proof, as expressed in *Loveladies*, is not a view that has been adopted by this Court, nor did the Court of Appeals for the Federal Circuit

the argument, therefore, is insupportable. In *Lucas*, this Court specifically recognized that the burden of proof remains on the landowner to show that the regulatory action has denied all economically beneficial use of the land. 508 U.S at ___, n.6, 112 S.Ct. at 2893, n.6. The burden in the proceedings below was properly allocated and the Mocks did not meet that burden.

IV. THE DECISIONS BELOW DO NOT CONFLICT WITH DECISIONS OF THE CIRCUIT COURTS OF APPEAL

Petitioners suggest that the decisions below in this case are inconsistent in certain respects with decisions of the United States courts of appeal, specifically, two decisions of the Court of Appeals for the Federal Circuit: *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *vacating and remanding* 21 Cl. Ct. 161 (1990), *cert. denied*, ___ U.S. ___, 115 S.Ct. 898 (1995), and *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), *aff'g.* 21 Cl. Ct. 153 (1990). Contrary to petitioners' suggestions, however, the Pennsylvania courts' decisions are not in conflict with these opinions.

Petitioners argue that Pennsylvania insists that "the property owner exhaust all manner of impossibilities" rather than adhering to the Federal Circuit's requirement, expressed in *Florida Rock*, that the determination of deprivation of economically viable use of property "be guided by its market value, if any, after the permit denial." Petition for a Grant of Certiorari at 18.

This argument juxtaposes what are really two separate components of the takings analysis. The first issue is whether there has been a definitive determination of the effect of the

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consider the Court of Claims' reasoning on this issue. In any event, this argument, like many of petitioners' arguments, rests on the flawed assumption that the Mocks established that further applications would be futile.

regulatory restriction on the property, and the second issue is the use of fair market value in analyzing economic viability.

As to the first issue, the courts below in this case said, in essence, that there had not been such a determination. Because there remain possibilities for permitted development of the site under the regulatory scheme, it cannot be said that there is no viable economic use for the property. The Pennsylvania courts have not insisted on "all manner of impossibilities", but, rather, that the effect of the regulatory restriction on the property be fully determined, given that the Mocks did not demonstrate that additional efforts to obtain a permit for the site would be futile. This outcome is consistent with this Court's analysis of the exhaustion issue. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561 (1986).

In *Florida Rock*, on the other hand, the Court of Claims initially determined that the only viable use of the property could not be permitted under the regulation. *Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct 160 (1985), *rev'd.* 791 F.2d 893 (Fed. Cir. 1986). Based on this finding, the Court of Claims concluded that a taking had occurred, but, on appeal, the Federal Circuit ruled that the Court of Claims erred in this conclusion. *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied* 479 U.S. 1053, 107 S.Ct. 926 (1987). The error lay in the Court's assumption that "if there was, under the regulation, no allowable and practicable immediate use, this established a taking". 791 F.2d at 901. The Court of Claims had emphasized the denial of immediately viable use and failed to determine fair market value, a determination which the federal Circuit said must include consideration of the landowner's ability to recoup its investment. 791 F.2d at 905.

As to petitioners' argument on the application of the fair market value standard of *Florida Rock*, there are flaws in the reasoning. First, petitioners are not in the same position as the property holders in *Florida Rock*, given that permittable uses for the property remain. Second, even if there were no permittable

uses, petitioners ask this Court to focus on precisely what the Federal Circuit cautioned against--that is, the immediately viable use of the property. Petitioners do so by asking the Court to rely on the Environmental Hearing Board's finding concerning the value of the property at present, undeveloped and without a permit. Finally, even assuming that petitioners were in the position of the claimants in *Florida Rock*, the record below will not permit an examination of fair market value as defined by the Federal Circuit court, as the evidence to support this determination is totally lacking.

Petitioners make the following argument concerning *Loveladies*:

> In its adjudication of petitioners' takings claim, the EHB found that the property, without a permit to fill in a portion of the wetlands, was essentially valueless, and noted that with such a permit, the site could have a value of $175,000 -- the amount offered by Midas -- or greater. But contrary to the Federal Court's opinion in *Loveladies' Harbor*, the Pennsylvania courts made a radical retreat from *Lucas* and held that this was not enough for a regulatory taking.

Petition for a Writ of Certiorari at 11.

Here again, petitioners are not in the same position as the claimants in the cited case. In *Loveladies*, it was established in the Court of Claims that any modified or less ambitious proposals would have been futile; there was no suggestion that subsequent permit applications would be successful. In petitioners' case, the opposite is true. The problems that afflict petitioners' argument on *Florida Rock* are equally fatal to their argument on *Loveladies*. Petitioners' arguments that the Court should resolve inconsistencies between the Pennsylvania courts' decisions below and the decisions of the Federal Circuit Court of Appeals are unjustified based on the record below.

V. NO COMPELLING REASONS EXIST TO JUSTIFY A GRANT OF REVIEW ON CERTIORARI

A petition for a writ of certiorari will be granted only for compelling reasons. S.Ct Rule 10. This petition presents no such grounds. The Pennsylvania courts decided the case below in a manner consistent with the rulings of this Court and of the United States courts of appeals. There is no assertion in the petition that the rulings conflicted with the decision of any other state court of last resort. While petitioners assert that the case "begs for guidance" on the issue of economic impact, Petition for Writ of Certiorari at 18, the Pennsylvania courts correctly analyzed the facts in the case by utilizing this Court's discussions on consideration of economic impact.

The case presents no novel issues or unprecedented legal conclusions by the Pennsylvania courts. The dispute is, at heart, a factual one--is the property devoid of economic value as a result of the regulatory restriction? The Environmental Hearing Board said no to this question, and the Pennsylvania appellate courts agreed. Petitioners ask this Court to reexamine that answer and try to couch the effort to reexamine factual findings in legal theories, some newly raised, and some based on erroneous factual conclusions.

Petitioners rest the great weight of their arguments on the Board's factual conclusion that the property is essentially valueless without a permit. Petitioners' position is an extreme one, that is, that the only proper reading of *Lucas* is one that concludes that the Environmental Hearing Board's finding categorically entitles them to compensation. Petition for a Writ of Certiorari at 11. To accept this argument, the Court must accept a theory that, if applied, would greatly expand the number of compensable takings effected by the regulatory process.

Under petitioners' theory, landowners need only submit one permit application for the most commercially profitable use of the land and, if that permit application is denied, and the land at

the time of the denial is then valueless, the landowner would be entitled to compensation even though other permittable uses of the property remain unexplored. This Court envisioned that the situation that called for application of *Lucas*' categorical rule would be "extraordinary", 508 U.S at ___, 112 S.Ct. at 2894. But under petitioners' expansive reading of *Lucas*, application of the rule would be commonplace and far from the rare event envisioned by the Court.

All takings analysis is an exercise in balancing; the government's need to regulate property use in the public interest is weighed against the protection of personal property rights. Petitioners' arguments are an attempt to tip that balance in favor of private property interests. This Court recognized long ago that

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law[.]

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 43 S.Ct. 158, 159 (1922). That observation is particularly relevant to an analysis of this case.

CONCLUSION

For all of the foregoing reasons, the Commonwealth of Pennsylvania, Department of Environmental Protection, respectfully requests that the Court deny the Petition for a Writ of Certiorari.

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